Supreme Court, U.S.
FILED

03 9 JUN 30 2003

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In the Supreme Court of the United States

WILLIAM G. CABRERA,
PETITIONER,

Petitioner,

v.

CHARLES L. HINSLEY,
RESPONDENT.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Stone v. Powell*, 428 U.S. 465, 494 (1976), this Court held that habeas corpus relief is not available to remedy a violation of the Fourth Amendment, if the State has provided "an opportunity for full and fair litigation of the Fourth Amendment claim." Citing conflicting standards developed in various circuits, the court below noted that this Court's ruling in *Stone* has "caused considerable consternation over what exactly 'full and fair' means." The court termed irrelevant in Fourth Amendment cases the standards for gauging fair state-court proceedings added to the federal habeas statute by the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2284(d). The court concluded that habeas relief must be denied in all Fourth Amendment cases as long as the state proceeding was not a "sham," no matter how "egregious" the state courts' failure to honor the Fourth Amendment. The following questions are presented:

(1) Should the Court resolve the conflict over the standard for implementing the "full and fair litigation" test of *Stone v. Powell* and decide that a state prisoner does not have to establish that the proceedings in the State courts were a "sham" before he is entitled to have a federal habeas court address an "egregious" Fourth Amendment violation?

(2) Are the grounds for obtaining habeas corpus as limited by the Antiterrorism and Effective Death Penalty Act relevant in determining whether a state prisoner has received "full and fair" litigation of his Fourth Amendment claim in the state courts?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner William G. Cabrera respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals reversing the district court's grant of the petition for habeas corpus (App., *infra*, 1a-12a) is reported at 324 F.3d 527. The opinion of the district court granting the petition for habeas corpus (App., *infra*, 13a-43a) is reported at 172 F.Supp.2d 966.

The opinion of the Supreme Court of Illinois on direct appeal (App., *infra*, 44a-71a) is reported at 116 Ill.2d 474. The opinion of the Appellate Court of Illinois on direct appeal (App., *infra*, 72a-81a) is reported at 134 Ill.App.3d 526. The ruling of the Circuit Court of Illinois upholding Mr. Cabrera's warrantless at-home arrest (App., *infra*, 82a-90a) is unreported.

JURISDICTION

The judgment of the court of appeals was duly entered on March 31, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides that:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT

A. The Underlying Facts

On February 12, 1981, police found the body of Yoel A. Keena in a back room of the Assyrian National Foundation. (App., *infra*, 44a). The police subsequently learned that some of the victim's traveler's checks were used the day after the homicide to make purchases at the "Different Circle" clothing store in the Century Mall in Chicago. (App., *infra*, 45a).

A week later, the police interviewed the assistant manager of the store, who remembered that a group of three men had come into the store on the day after the homicide, and that one of the men made purchases with the victim's traveler's checks. *Ibid.* Several days after the interview, the assistant manager went to the police station and identified from mug shots 18-year old William Cabrera, the petitioner, as one of the three men who had come into the store. *See id.*

Armed only with this information, the police proceeded to Mr. Cabrera's apartment with the intention of *arresting* him. The officers neither sought nor obtained an arrest warrant. *Ibid.*

Mr. Cabrera was not at home. The police asked the clerk-receptionist at the apartment house to inform them when Mr. Cabrera returned. *See id.* No stakeout was posted to keep watch over Mr. Cabrera's possible return to the apartment. (App., *infra*, 46a).

The police made no effort to procure an arrest warrant after that initial visit. The next day, the receptionist from Mr. Cabrera's building called the police at around 5:30 p.m. to say that Mr. Cabrera was at the apartment. *Ibid.* Later that evening the police returned to Mr. Cabrera's apartment. *See id.* The lead detective testified that, when his team went back to the apartment, it was still their intent to *arrest* Mr. Cabrera without a warrant. *Ibid.*

When the police knocked on Mr. Cabrera's door, he came to the door "wearing only gym shorts and looking as though he had just taken a bath or a shower." *Ibid.* The police immediately placed Mr. Cabrera under arrest, advising him that he had been "identified as cashing the checks or utilizing the taken travelers checks." *Ibid.*

The police gave Mr. Cabrera *Miranda* warnings. Although they lacked either an arrest warrant or a search warrant, the police searched his apartment, but they found nothing to incriminate him.

Mr. Cabrera was then brought to the station house and placed in a windowless room with just a table and three chairs. (Ill. Trial Ct. Rec. 160-61). The officers locked the door to prevent him from leaving. (Ill. Trial Ct. Rec. 167). With two exceptions (to force him to accompany the detectives when they went to search another suspect's home and to subject him to an uncounseled polygraph test), Mr. Cabrera was locked up for more than 37 consecutive hours. (Ill. Trial Ct. Rec. 425).

Throughout his detention, Mr. Cabrera was never taken to a telephone to contact a relative or an attorney. (Ill. Trial Ct. Rec. 421). Throughout his detention, the officers never told him when or whether he would be released.

For approximately the last 14 hours of his 37-hour ordeal, Mr. Cabrera was handcuffed to a ring on the wall. (Ill. Trial Ct. Rec. 602-03). *Cf. Hope v. Pelzer*, 122 S. Ct. 2508, 2513-15 (2002) (Alabama corrections officers violated Eighth Amendment by handcuffing inmate to hitching post for seven hours, during which time they denied him bathroom breaks, gave him limited amounts of water and taunted him). In his 37-hour detention, he was fed three sandwiches. (Ill. Trial Ct. Rec. 191-92, 197 & 594).

Although the police testified that Mr. Cabrera told them that he had slept, none of the persons who looked in on him

throughout the 37-hour detention could testify that they saw this happen. (Ill. Trial Ct. Rec. 431). The room had neither a cot nor a bed, and Mr. Cabrera was handcuffed to the wall for the last 14 hours. (Ill. Trial Ct. Rec. 176-77 & 428-31).

Finally, on February 26 between 2:30 a.m. and 3:15 a.m.—approximately 34 hours into his confinement to the room—Mr. Cabrera gave a statement that he and a friend had broken into the Foundation offices and that he had seen his companion strike the victim twice when they discovered him inside the offices. (App., *infra*, 48a). Almost three hours later, at about 5:40 a.m., a court reporter took his statement. (Ill. Trial Ct. Rec. 404).

B. The Illinois Proceedings

Mr. Cabrera subsequently retracted his statement and argued that his warrantless arrest and confinement violated the Fourth Amendment and that the incriminating statements he made while in unlawful detention had to be suppressed. In rejecting his Fourth Amendment claim, the Illinois court system, at each of its three levels, relied on a different ground. Each of the appellate courts recognized that the justification on which the court below had relied could not be sustained. The State Supreme Court eventually came up with a new justification for the warrantless arrest that was equally baseless.

1. The trial court believed that the police had probable cause to arrest Mr. Cabrera, because the court "found" that Mr. Cabrera had been in possession of the victim's traveler's checks:

> "The salesman made a photo[]identification of [Mr. Cabrera] as being the person that passed the Traveler's checks belonging to the deceased on 2-23-81 and told the police that the picture was the same but the person that actually passed the checks had a big scar on his neck. . . . [Upon finding Mr. Cabrera at the apartment, t]he police observed a scar on his

> neck and arrested the Defendant without a warrant. Clearly probably [sic] cause for the arrest of the Defendant was present." (App., *infra*, 84a).

The trial court's "facts," however, squarely and irreconcilably contradicted the store manager's undisputed testimony that: (1) Mr. Cabrera was not the person who used the traveler's checks to pay for any purchases, and (2) that Mr. Cabrera was not even at the counter at the time of the purchase. (App., *infra*, 45a).

In fact, the State later confirmed before the Illinois Supreme Court that the trial court's factual findings had been flatly wrong and that Mr. Cabrera did not have the traveler's checks:

> "[The assistant manager] testified at trial that the defendant came into his store with two other men, and that [Mr. Cabrera] browsed through clothing while one of the other two made the purchase at issue. [The store manager's] testimony has been accepted by the State as an accurate account; *thus the State now agrees that prior to the defendant's arrest there was no reason to believe that he had made a purchase with, or engaged in a transaction concerning, the victim's check.*" (App., *infra*, 65a) (Simon, J., *dissenting*) (emphasis added).

After the trial court refused to suppress the confession extracted after the unlawful arrest, a jury found Mr. Cabrera guilty of felony-murder, robbery and burglary. (App., *infra*, 72a).

2. On appeal, the Illinois Appellate Court tacitly rejected the facts supporting the trial court's erroneous probable-cause determination. In its decision, the Appellate Court blurred the identity of the individuals who had the deceased's traveler's checks. (App., *infra*, 73a (referring ambiguously to the "men who had used the checks"); App, *infra*, at 1174

(Mr. Cabrera was "one of the three individuals who purchased clothes and paid for them with the victim's traveler's checks")).

The Appellate Court instead adopted a different view of the facts—namely, that the police had *actual* knowledge of Mr. Cabrera's prior criminal record, and that this purported knowledge of Mr. Cabrera's criminal record furnished probable cause to arrest him for this crime:

> "[H]ere, the arresting officers had more facts available to them than that defendant was merely present with another suspect. In the present case, *the officers knew* that defendant had been twice convicted of burglary in the past 6 months. Moreover, *they knew* defendant's past burglaries had occurred in the same general area as the murder and burglary they were investigating, and that defendant lived in the general area where the murder and burglary occurred." (App., *infra*, 78a (emphasis added)).

3. The detectives' supposed knowledge of Mr. Cabrera's criminal history, however, was found nowhere in the record. The State again had to concede before the Illinois Supreme Court that the record was bereft of support for the Appellate Court's "findings," just as the record did not support the trial judge's "finding." (App., *infra*, 63a (Simon, J., dissenting) (noting "State's admission during oral argument . . . that 'it is not in the record what police officer[s] actually knew at the time [they] arrested the defendant'")).

When this defect in the Appellate Court's decision was conceded, the Illinois Supreme Court abandoned the "facts," on which the two lower courts had relied as justifying Mr. Cabrera's warrantless arrest. Nonetheless, the Illinois Supreme Court affirmed. It held that the lower courts' rulings on probable cause could be sustained on the *likelihood* that the officers *must have* made investigations which "certainly would have" led to discovering Mr. Cabrera's record and that

the information the court assumed they must have obtained would have sufficed to furnish probable cause to arrest petitioner for the crimes at the Foundation offices:

> "[The investigating officers] *certainly would have* examined the Chicago police department records of the defendant. At the time of the defendant's arrest, *it must be reasonably concluded* that the detectives . . . ascertained the information appearing in the Chicago police department records regarding the defendant." (App., *infra*, 53a (emphasis added)).

On this hypothesis, and over a dissent, the Illinois Supreme Court declared that the police must have had sufficient information to constitute probable cause. Mr. Cabrera's subsequent state-court petition for post-conviction relief was also unsuccessful. (App., *infra*, 16a).

C. Habeas Proceedings Below

1. Mr. Cabrera later sought habeas relief from the United States District Court for the Northern District of Illinois. The Warden argued before the district court that *Stone v. Powell*, 428 U.S. 465 (1976) barred habeas review of Mr. Cabrera's Fourth Amendment claims. The district court, however, disagreed.

The Illinois Supreme Court had held that it "must be reasonably concluded" that the police would have known of Mr. Cabrera's criminal history before proceeding to arrest him. (App., *infra*, 54a). The district court noted, however, that "*nothing* in the record showed that the police were aware of [Mr. Cabrera]'s criminal history at the time they went to his home to arrest him." (App., *infra*, 33a). Specifically, "no one testified that the police ever looked up [Mr. Cabrera's] police record. . . . nor even that it was standard procedure to do so." (App., *infra*, 35a).

Moreover, as the district court observed, the Illinois Supreme Court's holding that it "must be reasonably con-

cluded" that the police must have known of Mr. Cabrera's criminal history prior to the arrest would have been constitutionally insufficient to supply probable cause for his arrest. The Illinois court's assumption directly contradicts this Court's decision in *Beck v. Ohio*, 379 U.S. 89, 97 (1964) (officer's knowledge of suspect's "previous record" coupled with his physical description could not establish probable cause: "to hold that knowledge of either or both of these facts constitutes probable cause would be to hold that anyone with a previous criminal record could be arrested at will"). Thus, the district court correctly concluded:

> "The 'record' cannot be understood to include plausible assumptions. It might be plausible to assume that a burglar with an extensive record would be known to every member of a small-town police department, but for a court to make that kind of assumption in the absence of testimony would derogate the Fourth Amendment." (App., *infra*, 37a).

Accordingly, the district court held the convictions to be unconstitutionally defective, because they rested largely on Mr. Cabrera's own incriminating statements, which were the product of an unlawful arrest. *See Wong Sun v. United States*, 371 U.S. 407, 485 (1963) ("[V]erbal evidence which derives . . . immediately from an unlawful entry and an unauthorized arrest . . . is no less the 'fruit' of official illegality than the more common tangible fruits of the unwarranted intrusion."); *see also Brown v. Illinois*, 422 U.S. 590, 603 (1975) ("Miranda warnings, alone and per se, cannot always make the act sufficiently a product of free will to break, for Fourth Amendment purposes, the causal connection between the illegality and the confession."); *Kaupp v. Texas*, 123 S. Ct. 1843, 1847-48 (2003) (per curiam) (suppressing suspect's confession obtained after an arrest made without probable cause). The court granted the writ conditioned upon Mr.

Cabrera's release from an unrelated life sentence. The State appealed.

2. On appeal, the United States Court of Appeals for the Seventh Circuit reversed. The court held that it did not have to consider whether the state court proceedings failed to satisfy the standards that Congress imposed with the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, Title I, § 104(3), 110 Stat. 1218 (1996), which amended 28 U.S.C. § 2254(d) and generally restricted federal habeas corpus relief. Instead, the court focused exclusively on its view of the "full and fair litigation" test of *Stone*. The court ruled that Mr. Cabrera did have an opportunity for "full and fair" litigation of his Fourth Amendment claims because he had "raised the issue in a suppression hearing prior to trial; the Illinois Appellate Court and the Illinois Supreme Court also considered the issue." (App., *infra*, 7a).

Despite the fact that the State conceded that the Illinois trial court's ruling contradicted undisputed testimony in the record, and that the different set of "facts" on which the appellate courts had relied lacked any basis in the record, the Seventh Circuit declared that "[t]here is no indication that these [state] courts were careless of Cabrera's *right to present his claim*." *Ibid.* (emphasis added). *Compare id.* with App, *infra*, 65a-66a (State conceding errors made in the Illinois trial and intermediate appellate courts) (Simon, J., dissenting).

For the court below, the original opportunity to "present" the Fourth Amendment claim was enough to bar federal habeas review. The court noted that the circuits are manifestly confused about "what exactly 'full and fair' means" under *Stone*. (App., *infra*, 5a). In the eyes of the Seventh Circuit, it means nothing more than that the process for submitting Fourth Amendment claims to the state courts was not a "sham," such as when the trial judge was "sleepwalking" or "bribed." (App., *infra*, 6a).

Moreover, the court held that, as it understands this Court's decision in *Stone*, "[a]bsent a subversion of the hearing process, we will not examine whether the judge got the decision right," and "[e]ven an egregious error" in refusing to honor a valid Fourth Amendment claim "would not by itself justify habeas relief." (App., *infra*, 5a). Thus, the court declined to consider whether the Illinois Supreme Court's refusal to comply with this Court's holding in *Beck*, coupled with the errors from the lower state courts, may have deprived Mr. Cabrera of an opportunity for full and fair review.

REASONS FOR GRANTING THE PETITION

I. THE STANDARD ADOPTED BY THE SEVENTH CIRCUIT CONFLICTS WITH THIS COURT'S DECISION IN *STONE*.

A. *Stone v. Powell* does not justify a standard that compels a federal habeas court to ignore an "egregious" violation of the Fourth Amendment unless the prisoner shows that the state process was merely a "sham."

In *Stone v. Powell*, this Court held that a state prisoner may not be granted habeas corpus relief under the Fourth Amendment "where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim." 428 U.S. at 494. The Court did not expand upon the meaning of "an opportunity for full and fair litigation." Rather, the only guidance given for the meaning of this expression is a citation to *Townsend v. Sain*, 372 U.S. 293 (1963), which appears in a footnote with no explanation beyond a "*cf.*" signal.

The citation to *Townsend*, however, was not carelessly thrown in. In *Townsend*, the district court was asked to hold an evidentiary hearing to determine whether the defendant's confession should have been suppressed. This Court held that a habeas court must hold an evidentiary hearing if the habeas applicant "did not receive a full and fair evidentiary

hearing in a state court." *Id.* at 312. Specifically, this Court identified six circumstances under which "a full and fair evidentiary hearing" had not been granted. *See id.* at 314. These circumstances include instances where:

> "(1) the merits of the factual dispute were not resolved in the state hearing;
>
> (2) *the state factual determination is not fairly supported by the record as a whole*;
>
> (3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;
>
> (4) there is a substantial allegation of newly discovered evidence;
>
> (5) *the material facts were not adequately developed at the state-court hearing*; or
>
> (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."

Id. at 313. (formatting altered and emphasis added).

If these inquiries suggested by *Townsend* properly determine whether there has been an opportunity for a "full and fair" litigation of a Fourth Amendment claim under *Stone*, then the Seventh Circuit's "sham" test is unacceptably stringent. As the district court here found, without contradiction from the court of appeals, the state courts' "factual determinations" underpinning the rejection of Mr. Cabrera's Fourth Amendment claims were not "fairly supported by the record." *Ibid.* Moreover, to the extent that the State purports to justify the warrantless arrest on the theory that the investigating officers may have relied on knowledge of Mr. Cabrera's prior criminal history, those "material facts"—if they were facts at all—were not "adequately developed at the state court hearing." *Ibid.*

Despite this Court's deliberate citation to *Townsend* in *Stone* as offering guidance for the "full and fair litigation" test, the Seventh Circuit offhandedly dismissed the relevance of *Townsend*, stating:

> "The only help in *Stone* is a footnote to a prior case: 'Cf. *Townsend v. Sain*, 372 U.S. 293 (1963).' And of course the value, generally, of 'Cf.' citations is often only revealed in the eye of the beholder." (App., *infra*, 5a (emphasis added)).

No further mention of *Townsend* or its required inquiries is made in the Seventh Circuit's decision.

Although it may be true that the value of "cf." citations is only revealed in the eye of the beholder, the six Justices who joined *Stone* must have intended their citation to *Townsend* to merit more consideration than a back-of-the-hand dismissal. It is equally certain that the majority in *Stone* did not contemplate that deprivations of opportunities for "full and fair litigation" would be limited to wildly improbable scenarios such as state courts deciding "that probable cause is not required in Illinois" or state judges conducting the Fourth Amendment analysis while "sleepwalking." (App., *infra*, 6a). That test, now adopted by the Seventh Circuit, conflicts with what this Court intended in *Stone*.

In contrast, the district court diligently and correctly applied *Stone* through the lens of *Townsend*, finding that Mr. Cabrera did not have "an opportunity for full and fair litigation" when the state courts' ruling on his Fourth Amendment claim consisted of an assumption concerning police practices that was improper and untethered to any facts in the record.

B. The aims and purposes of the *Stone* bar are not advanced by denying habeas review in all Fourth Amendment cases not involving "sham" proceedings in the state courts.

The denial of habeas review of Fourth Amendment claims like Mr. Cabrera's is particularly inappropriate in view of the policies that animate *Stone*. The premise behind the *Stone* bar is that "the Fourth Amendment is crucially different from many other constitutional rights." *Stone*, 428 U.S. at 490 (*quoting Kaufman v. United States*, 394 U.S. 217, 237 (1969) (Black, J., *dissenting*)). Specifically, Fourth Amendment violations are "different in kind from denials of Fifth or Sixth Amendment rights in that claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable." *Stone*, 428 U.S. at 479.

Thus, opines *Stone*, "the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant," *id.* at 490, and "ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond any shadow of a doubt that the defendant is guilty," *ibid.* (*quoting Kaufman*, 394 U.S. at 237 (Black, J., *dissenting*)).

Declaring that "[a]pplication of the [exclusionary] rule thus deflects the truthfinding process and often frees the guilty," *Stone*, 428 U.S. at 490, *Stone* reasons that "the additional contribution, if any, of the consideration of search-and-seizure claims of state prisoners on collateral review is small in relation to the costs," *id.* at 493.

In cases like this one, however, where the product of a Fourth Amendment violation is not inherently trustworthy physical evidence but a dubious confession, the policy rationales underpinning *Stone* do not apply. Here, Mr.

Cabrera's at-home warrantless arrest did not result in the discovery of a proverbial smoking gun. Indeed, the police found no evidence in the apartment after their unlawful arrest and search. Yet, they continued to hold Mr. Cabrera for over 37 hours during which time the teenager was fed only three times and apparently did not sleep.

It was only under those circumstances that the police extracted the confession that was central to his conviction. Unlike incriminating physical evidence discovered through an illegal search, a confession extracted nearly two days after an unlawful arrest (even if minimally "voluntary" under the Due Process Clause) hardly carries a high degree of trustworthiness.

Thus, unlike the paradigmatic seizure of conclusive and tangible evidence contemplated by *Stone*, Mr. Cabrera's unlawful arrest and subsequent detention resulted in a self-incriminating statement that calls into question the "integrity of the fact-finding process" and renders his statement "inherently unreliable." Moreover, unlike the situation envisioned by *Stone*, Mr. Cabrera's lengthy and arduous detention without probable cause raises doubt as to whether the inculpatory statement he gave was "rendered untrustworthy by the means of its seizure."

Denial of habeas review for Fourth Amendment claims involving tainted confessions is, therefore, supported by neither the holding of *Stone* nor the principles that animate it.

II. THE SEVENTH CIRCUIT'S MISREADING OF *STONE* HAS BROUGHT ITS DECISION IN CONFLICT WITH DECISIONS OF OTHER CIRCUITS.

1. The court of appeals candidly acknowledged that not only panels of the Seventh Circuit but those of other circuits as well have wrestled with the challenge of figuring out how to implement *Stone*'s "full and fair litigation" standard. It cited decisions from eight other circuits that manifest "con-

siderable consternation over what exactly 'full and fair' means." (App., *infra*, 5a). On this extraordinarily important question affecting so many persons, the circuits are wildly splintered.

In fact, of the eight cases cited by the court of appeals, six provide different criteria for determining whether a habeas petitioner has enjoyed an opportunity for "full and fair litigation" within the meaning of *Stone*. For example, the Fifth Circuit holds that a habeas petitioner has been deprived of such an opportunity where "state processes routinely or systematically" are applied in such a way as to prevent the actual litigation of Fourth Amendment claims." *See Janecka v. Cockrell*, 301 F.3d 316, 321 (5th Cir. 2002) (emphasis added).

In contrast, the First Circuit requires a more individualized inquiry, which seeks to determine whether the habeas petitioner "had no realistic opportunity to litigate his Fourth Amendment claim full and fairly." *Sanna v. DiPaolo*, 265 F.3d 1, 8 (1st Cir. 2001). The Ninth Circuit looks only to the existence of an abstract opportunity to litigate. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996) (*Stone* inquiry turns solely on "whether petitioner had the opportunity to litigate his claim, not whether he did in fact do so or even whether the claim was correctly decided.").

In further contrast to the tests articulated by the First, Fifth and Ninth Circuits, *supra*, the Second, Sixth and Eighth Circuits employ two-step inquiries. The Sixth Circuit holds that under *Stone*, a habeas court must first ask "whether the state procedural mechanism, in the abstract, presents the opportunity to raise a fourth amendment claim." *Machacek v. Hofbauer*, 213 F.3d 947, 952 (6th Cir. 2000). If so, the court must then determine "whether presentation of the claim was in fact frustrated because of a failure of that mechanism." *Ibid.*

The first part of the Second Circuit's two-step inquiry is similar to that of the Sixth Circuit: there has not been an opportunity for full and fair litigation where there are no "corrective procedures at all to redress the alleged fourth amendment violations." *Capellan v. Riley*, 975 F.2d 67, 70 (2d Cir. 1992). Unlike the Sixth Circuit, however, the second part of the Second Circuit's inquiry does not merely look to whether there has been a "failure of the mechanism." *Machacek*, 213 F.3d at 952. Rather, the second part of the Second Circuit's inquiry finds that there has not been an opportunity for a full and fair hearing only where there has been an "*unconscionable* breakdown" in the underlying process. *Capellan*, 975 F.2d at 70 (emphasis added).

The Eighth Circuit agrees with the two-part test articulated by the Second Circuit, but does not permit "a probing review of the state court record, either of the factual findings pertaining to the petitioner's search-and-seizure claims or of the application of Fourth Amendment principles with those facts" in determining whether any inadequacy in reviewing the Fourth Amendment claims was "unconscionable." *Willett v. Lockhart*, 37 F.3d 1265, 1271-72 (8th Cir. 1994).

2. Into this jumble of tests comes the decision of the court below, a one-step inquiry which asks whether the state adjudicative mechanism was a "sham," but which narrowly defines a "sham" to include circumstances that are not ever likely to occur (*i.e.*, a state court refusal to recognize the Fourth Amendment, or bribery of the state judge, or the judge's "sleepwalking" through the process). (App., *infra*, 6a). Since the circumstances that would reveal a "sham" are so fanciful, the Seventh Circuit has established a test that virtually bars any meaningful inquiry of the sort *Stone* contemplated into whether the prisoner had been accorded "full and fair litigation" of his Fourth Amendment claim.

In adopting this most stringent test for confining the power of a federal habeas court, the Seventh Circuit looks

only to palpable and, indeed, implausible *procedural* defects. It expressly rejects any consideration of the merits of the Fourth Amendment claim, no matter how "egregious" the refusal to uphold a valid Fourth Amendment claim. (App., *infra*, 5a). Only *after* such a procedural error has been identified, explains the court of appeals, may a habeas court look to the substance of the state courts' decision. (App., *infra*, 6a ("Absent a subversion of the hearing process, we will not examine whether the judge got the decision right.")).

This approach goes well beyond what *Stone* held in cutting off the right to federal habeas review of Fourth Amendment violations. Although *Stone* sharply limits such review, it did not absolutely bar habeas review of all Fourth Amendment claims. The Seventh Circuit's test, however, does precisely that. By limiting Fourth Amendment claims to those addressed in "sham" proceedings, and by declaring that a "sham" proceeding is only one in which the trial judge was "bribed" or "sleepwalking," the Seventh Circuit has transformed *Stone* into an impenetrable barrier to remedying even "egregious" Fourth Amendment violations.

3. This test conflicts with tests adopted in other circuits (as noted above) which recognize that *Stone* leaves the federal courthouse door ajar to prisoners confined in violation of their Fourth Amendment rights. For example, in *Herrera v. LeMaster*, 225 F.2d 1176, 1178 (10th Cir. 2000), the New Mexico Supreme Court had applied its own law on "harmless error"—as opposed to that established by this Court's 1967 *Chapman* decision—to find that Fourth Amendment violations had been harmless. The Tenth Circuit held that New Mexico had not provided the habeas petitioner with an opportunity for full and fair litigation, because the state courts applied such a patently incorrect standard. *Ibid.* The state court proceedings were not a "sham." They just reached an egregiously wrong result, as measured by this Court's precedents.

Similarly, in *Doescher v. Estelle*, 666 F.2d 285 (5th Cir. 1982), the state courts had failed to apply a decision by this Court bearing on the defendant's Fourth Amendment claims. This Court's decision had been handed down three months before decision on the direct appeal. *See id.* at 286. The defendant sought collateral relief from the state courts, citing the intervening Supreme Court decision. *Id.* at 287. The state courts denied this relief, however, "on grounds that petitioner's contentions had been adequately dealt with in the direct criminal appeal." *Ibid.* The defendant then sought federal habeas. The Fifth Circuit held that, under these circumstances, the petitioner did not receive an opportunity for a full and fair litigation before the state courts, because the courts had not considered a relevant precedent. The Fifth Circuit did not require the prisoner to show that the failure resulted from judicial corruption or somnambulism or any other form of "sham."

As both *Herrera* and *Doescher* illustrate, other circuits do not require a prisoner to show that the state judge "had his mind closed to the necessity of a hearing, or was bribed, or decided . . . that probable cause is not required in [a particular state] . . . , or was sleepwalking . . . ." (App., *infra*, 6a). Nor was there a "subversion of the hearing process" in either of those cases. Both of those cases simply presented serious errors from which the courts were able to infer that the respective defendants had not enjoyed an opportunity for a full and fair litigation of their Fourth Amendment claims. This multi-circuit "consternation" about the meaning of one of this Court's important decisions presents a classic case for certiorari.

4. In the case at bar, the presence of grave and unexplained errors throughout the state-court proceedings need not be inferred—the State actually *conceded* that both the trial court and intermediate appellate court relied on facts which either contradicted or were unsupported by the record. (App., *infra*, 65a-66a). Moreover, as discussed in greater de-

tail *infra*, the Illinois Supreme Court ultimately decided the Fourth Amendment issue without resort to facts, employing rather a "presumption" foreclosed by this Court's decision in *Beck*.

The Seventh Circuit's procrustean refusal to take cognizance of the magnitude of substantive errors in state proceedings conflicts with the more sensible approaches adopted by other circuits.

III. THE STATE COURTS DID NOT AFFORD PETITIONER A "FULL AND FAIR" DECISION OF HIS FOURTH AMENDMENT CLAIM, AS THAT TEST SHOULD BE INTERPRETED.

A. The Illinois courts relied on "facts" not fairly supported by the record and not developed at a hearing.

If the inquiries proposed by *Townsend v. Sain* govern rather than the procedural "sham" test adopted by the Seventh Circuit, the district court properly awarded habeas relief to Mr. Cabrera.

As discussed above, the Illinois courts sustained the existence of "probable cause" to make a warrantless arrest inside petitioner's home on the basis of "facts" that the State conceded were wrong (as "found" by the trial court and the Appellate Court) or that lacked *any* record support developed at the suppression hearing or at the trial (in the case of the State Supreme Court's justification for the arrest). The district court properly concluded that this progression of "bait and switch" throughout the Illinois court system, leading eventually to a purely speculative basis for finding probable cause, meant that petitioner did not have the benefit of "full and fair" litigation of his rights.

IV. THE STANDARDS ESTABLISHED BY THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT SHOULD BE USED TO DETERMINE WHETHER STATE COURTS GAVE "FULL AND FAIR" CONSIDERATION TO FOURTH AMENDMENT CLAIMS.

This case also poses an important issue regarding how to reconcile *Stone*'s "full and fair litigation" test with the Antiterrorism and Effective Death Penalty Act (AEDPA), Pub. L. No. 104-132, 110 Stat. 1218 (1996). That Act generally amended the federal habeas statute to preclude relief unless the prior state court proceedings failed to satisfy specific statutory tests. *See* 28 U.S.C. § 2254(d).

That Act generally requires federal courts to accept the rulings of state courts on federal constitutional claims, unless the adjudication in the state proceeding:

> "(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or
>
> "(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding."
>
> 28 U.S.C. § 2254(d).

The Seventh Circuit held that these statutory standards are irrelevant in considering Fourth Amendment claims and that that only *Stone*'s "full and fair litigation" standard applies.

In thrashing around to find out "exactly what 'full and fair' means" (App., *infra*, 5a-7a), however, the court ignored the clearest guidelines available: what Congress decided, after *Stone*, should be the limits that govern *all* federal habeas review of state court adjudications of federal constitutional

claims. Any state court approach to resolving a federal constitutional claim that fails to satisfy the post-*Stone* statutory tests of AEDPA should be regarded as failing to accord the accused a "full and fair" litigation of his claim under *Stone*. The Illinois courts flunked both aspects of the tests crafted by Congress to determine when it is no longer appropriate to withhold federal relief.

A. The Illinois courts' decisions are contrary to this Court's decisions that had clearly established that a person's mere presence in the company of a suspect does not give rise to probable cause to arrest him.

The district court satisfied the first prong of the test laid out in AEDPA when it concluded that the state courts had deprived petitioner of his right to "full and fair" litigation of his Fourth Amendment claim. It was patently unfair under established federal law for the Illinois courts to "assume" a finding of probable cause to arrest petitioner. Shorn of the Illinois courts' manifestly erroneous assumptions that Mr. Cabrera had cashed the traveler's checks, or that the police knew of Mr. Cabrera's criminal record, or that the police "certainly would have" learned of Mr. Cabrera's prior convictions, "the record shows only that the arresting officers knew that Petitioner had . . . accompanied someone who had purchased items with the victim's traveler's checks." (App., *infra*, 37a). This Court had clearly held, however, before the Illinois courts rejected Mr. Cabrera's Fourth Amendment claims, that mere association with a suspect is insufficient to establish probable cause.

In *United States v. Di Re*, 332 U.S. 581, 583 (1948), an informant advised police that a counterfeiter was scheduled to sell him bogus gasoline ration coupons in the counterfeiter's car. At the appointed time, police went up to the counterfeiter's car. In the car, the police found the informant, the counterfeiter and a third person, Michael Di Re.

The informant had not previously indicated to the police that Di Re was involved in any crime, and at the time of the arrest, the informant identified only the counterfeiter as having sold any of the contraband. *See id.* at 594.

The police arrested both the counterfeiter and Di Re. *See id.* at 583. After a search at the station house, police discovered contraband on Di Re as well. *See id.* This Court overturned Di Re's conviction. The Court rejected the proposition that Di Re's presence in the company of the counterfeiter was sufficient to give rise to probable cause to arrest him:

> "The argument that one who accompanies a criminal to a crime rendezvous cannot be assumed to be a bystander, forceful enough in some circumstances, is farfetched when the meeting is not secretive or in a suspicious hide-out but in broad daylight, in plain sight of passerby, in a public street of a large city, and where the alleged substantive crime is one which does not involve any act visibly criminal. . . . Presumptions of guilt are not lightly to be indulged from mere meetings." *Id.*

This Court reiterated this principle in *Ybarra v. Illinois*, 444 U.S. 85 (1979). In *Ybarra*, police searched a tavern and its owner for heroin, pursuant to a warrant. *See id.* at 87-88. In the course of the search, they frisked the customers for weapons. *See id.* at 88. During the initial frisk, the police found no weapons on Ybarra or any of the other customers. *See id.* After frisking all of the customers, the police returned to Ybarra and found a pack of cigarettes on his person. *See id.* at 89. Upon opening the cigarette pack, police discovered heroin. *See id.* Ybarra was arrested and convicted for possession. *See id.* at 89-90. As in *Di Re*, this Court overturned the conviction.

The Court observed that when the police entered the tavern, they had no reason to suspect Ybarra of any crime. *See id.* at 90-91. In fact, "the agents knew nothing in particular about Ybarra, except that he was present . . . in a public tavern at a time when the police had reason to believe that the bartender would have heroin for sale." *Id.* at 91. Under these facts, this Court held that the search of Ybarra was prohibited by the Fourth Amendment, because Ybarra's mere proximity to the suspect did not provide probable cause to search him: "[A] person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Id.*

The circumstances in the case at bar are indistinguishable from those in *Di Re* and *Ybarra*. Mr. Cabrera was first connected to the crime because he was seen in the company of someone who had used the victim's traveler's checks. It was solely on this basis that the detectives decided to arrest him. (App., *infra*, 47a (after assistant manager identified Mr. Cabrera, "[t]hat evening, [officers] went to the defendant's apartment")). Moreover, as in *Di Re*, Mr. Cabrera's propinquity to the suspect was "not secretive or in a suspicious hide-out", but rather "in broad daylight, in plain sight of passerby, in a public street of a large city," and indeed, at one of Chicago's larger malls. *Cf. Di Re*, 332 U.S. at 593.

As the State conceded below, Mr. Cabrera never had possession of the traveler's checks. (App., *infra*, 66a (Simon, J., dissenting)). The State has also conceded that the record does not show that the police knew of Mr. Cabrera's prior criminal convictions. (App., *infra*, 65a (Simon, J., dissenting)). Thus, as in *Di Re* and *Ybarra*, the only factual connection between Mr. Cabrera and the crime was his presence in the company of a suspect. As this Court cautioned in *Di Re*, "[p]resumptions of guilt are not lightly to be indulged from mere meetings." *Di Re*, 332 U.S. at 593.

Because such a presumption formed the sole basis for Mr. Cabrera's arrest, the arrest was not properly founded upon probable cause. The state courts' decisions sustaining probable cause were, in the words of AEDPA, 28 U.S.C. § 2254(d), "contrary to, or involved an unreasonable application of clearly defined" constitutional law previously established by this Court. They thus failed *Stone*'s "full and fair litigation" test.

B. The Illinois Supreme Court's decision, by holding that the pivotal fact in a probable cause can be assumed in the absence of any support in the record, does not satisfy the AEDPA standard for "fair" determination of a federal constitutional claim.

1. The Illinois Supreme Court held that, even though there was no record evidence that police officers had checked Mr. Cabrera's criminal history before arresting him, they "certainly would have examined the Chicago police department records" and, therefore, "it must be reasonably concluded" that they did so. (App., *infra*, 54a).

The effect of such an assumption is obvious: if state courts were permitted to assume pivotal facts which would create probable cause, the very purpose of holding hearings on Fourth Amendment claims would be rendered meaningless. By bending over backwards to accommodate such a presumption (particularly after the State conceded that both sets of "facts" adopted by the Illinois courts below were baseless), the action of the Illinois Supreme Court shows that Mr. Cabrera did not enjoy the right to "full and fair" litigation of his claim.

2. The Illinois Supreme Court's approach directly conflicts with a decision of a federal court of appeals. *See, e.g., United States v. Myers*, 308 F.3d 251, 255 (3d Cir. 2002) ("We construe the record in the light most favorable to the government. However, in doing so we do not supply the tes-

timony that the government failed to elicit during the suppression hearing. Similarly, we must refrain from drawing inferences that are either not supported by the record, or contrary to it, in an effort to uphold an arrest.").

3. Even if courts were somehow permitted to presume that police officers invariably follow procedures that appear reasonable in hindsight, such a presumption would still be insufficient to create probable cause under this Court's decision in *Beck v. Ohio*, 379 U.S. 89 (1964). In *Beck*, "the record show[ed] no more than that the officer 'had a police picture of [the defendant] and knew what he looked like,' and that the officer knew that the petitioner had 'a record in connection with [illegal gambling]'" prior to the arrest. *Id.* at 93.

This Court held such a showing to be inadequate for a warrantless arrest and search of the defendant in connection with a gambling offense. The two pieces of information possessed by the police in *Beck* are identical to the information claimed by the Illinois Supreme Court to have been in possession of the officers here: information about the defendant's physical appearance and his criminal history. Even with the improperly-made presumption applied by the Illinois Supreme Court, the finding of probable cause cannot stand.

This Court had "clearly established" (AEDPA, 28 U.S.C. § 2254(d)) that mere knowledge of a similar criminal history does not establish probable cause to arrest a person for a particular crime. It may well justify further investigation, but that is a long way from justifying a warrantless arrest in a person's home and an ensuing 37-hour confinement leading to a purported confession. This principle had been clearly established well before the Illinois Supreme Court relied on the *assumption* that the officers must have known of Mr. Cabrera's prior brushes with the law as the basis for holding that they had probable cause to arrest him.

Stone, therefore, should have been understood as permitting relief when state proceedings do not satisfy AEDPA

standards. The Seventh Circuit held, however, that AEDPA standards are irrelevant in deciding whether a prisoner had been accorded full and fair consideration of his constitutional claims in the state courts. This petition should be granted to establish that federal habeas courts should draw upon AEDPA standards in deciding whether review of Fourth Amendment claims is appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JUNE 2003